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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1937

SAL MARCUS, HELEN GOSS AND MORRIS A. GOLDSTEIN, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 274

ST. MAURICE, HELMKAMP AND MUSSER, A CALIFORNIA PARTNERSHIP, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 266 F.2d 905. The decision of the National Labor Relations Board (R. 114-143)[1] is reported at 119 NLRB 1026.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1959. The petition for a writ of certiorari

[1] References designated "R" are to the Joint Appendix in the court below.

was filed on August 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Associated General Contractors (AGC) and Local 3 of the Operating Engineers entered into a collective bargaining agreement that provided, *inter alia*, that the former would award work only to subcontractors who would undertake to abide by the terms of the agreement, including a provision requiring all employees covered by the agreement to join Local 3. The question presented is whether the AGC and Local 3, by executing and implementing this subcontractors' clause in their agreement, and thereby withholding work contracts from petitioner, engaged in unfair labor practices violative of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition at pp. xi-xv.

STATEMENT

The Associated General Contractors of America, Inc. (AGC), the prime contractor on a Travis Air Force Base construction project, subcontracted work to petitioner (St. Maurice, Helmkamp and Musser, a partnership we call "Musser") which put four of its employees on the job (R. 116; 9, 19, 22, 249).

Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO (Local 3), the labor organization representing AGC employees, insisted that Musser's employees had entered the jurisdiction regulated by the collective bargaining agreement between Local 3 and AGC and were subject to the terms and conditions of employment outlined therein, although these employees were represented by another union (R. 116-117, 36-37; 177-180, 211, 223-224). As a result of a work stoppage called by Local 3 to enforce this claim, AGC brought about the suspension of employment of Musser's employees and replaced them with its own employees (R. 117, 38-39; 9-10, 19, 22, 23, 175, 226). On these facts, the National Labor Relations Board found that, by effecting the removal of Musser's employees from the Travis project, AGC violated Section 8(a)(1),(2) and (3) of the National Labor Relations Act and Local 3 violated Section 8(b)(1)(A) and (2) of the Act (R. 118). The court below enforced the Board's order based on these findings (Pet. App. A, vi). No issue is presented by the present petition with respect to these findings or order.

Following the Travis incident, AGC and Local 3 in June 1955 executed a new collective bargaining agreement, known as the 1955 Master Agreement (R. 117; 189-204). This differed from the prior agreement in that it bound AGC to award work exclusively to subcontractors who would undertake to observe the terms of its agreement with Local 3 (R. 117; 13-14, 19, 23, 195). Further, it now contained a union security clause requiring all em-

ployees covered by the agreement to become members of Local 3 after 31 days (R. 117; 13-14, 19, 23, 192). The effect of these provisions was to preclude subcontractors, including Musser, from obtaining future work assignments from AGC unless they undertook as part of their contract to comply with the terms of the 1955 Master Agreement including the union security provision. When, following this agreement, Musser submitted a bid for a subcontract to H. Earl Parker, Inc., a regular member of AGC, Musser was told that it would be awarded the subcontract if it would undertake to comply with the terms of the 1955 Master Agreement (R. 118, 43; 232, 234-243, 249-250). Musser declined the offer on the ground that it had a collective bargaining agreement with another union and, therefore, could not compel its employees to join Local 3 (R. 118; 243-244).

On the foregoing facts, a majority of the Board (two members dissenting) dismissed allegations of the complaint that, by "executing, maintaining and enforcing" the union security and subcontractor clauses of the 1955 Local 3-AGC collective bargaining agreement, AGC and Local 3 had engaged in conduct violative of the Act (R. 114-135). The theory of the complaint was that by such conduct AGC, in violation of Section 8(a)(1),(2) and (3), had interfered with, restrained and coerced employees in the exercise of their statutory rights, contributed support to Local 3, and discriminated against the employees of Musser and other prospective subcontractors; and that Local 3, in violation

of Sections 8(b)(1)(A) and 8(b)(2), had restrained and coerced these employees in the exercise of their statutory rights to select their bargaining representative and had caused AGC to discriminate against them. In substance, the majority of the Board was of the view (in two separate opinions) that the contractual preclusion of future work assignments to prospective subcontractors under the circumstances here involved did not constitute an unlawful infringement of the statutory rights of the subcontractors' employees.

The Court of Appeals sustained the Board's dismissal of these allegations of the complaint (Pet. App. A, ix-x). Explaining its ruling, the court stated:

> . . . Here AGC abided by its agreement with Local 3. While the result might well have been that employees of Musser were denied employment on AGC projects due to their affiliation with a union other than Local 3, this did not come about as a result of strike action by Local 3, as found in the other case, or by pressure exerted through AGC, as also there found, but by a decision on the part of AGC itself to comply with its agreement with Local 3. Though, as the Board suggests in this Court, there was discrimination by one employer, AGC, against another, Musser, the Act stands aside in respect of such action, forbidding discrimination only against employees.
>
> We would not be well advised to substitute a judgment different from that of the Board. It could lawfully conclude, as it did, that the relationships between AGC and prospective em-

ployees of a prospective subcontractor were so attenuated that the refusal of AGC to award a sub-contract to Musser, and the existence, maintenance and implementation of AGC's agreement with Local 3, did not constitute discrimination by either AGC or Local 3 against employees.

ARGUMENT

The crux of petitioner's case is that AGC's refusal to award subcontracts to petitioner because the latter was unwilling or unable to comply with the 1955 Master Agreement between AGC and Local 3 necessarily tended to encourage membership in Local 3, and by that token a violation of the National Labor Relations Act was committed. Plainly, however, not every act of an employer or union which may have the foreseeable and necessary consequence of encouraging or discouraging union membership constitutes by reason of that factor, alone, conduct forbidden by the statute. As this Court has stated, the statute does not outlaw all encouragement or discouragement of union membership but only such as flows from discrimination directed against employees. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 42 43, 44-46. In the instant case, an essential element of the statutory violation is lacking, namely, discrimination against employees. AGC withheld work from petitioner because the latter refused to comply with the 1955 Master Agreement; the target of this discrimination was petitioner, not its employees. While the Act forbids discrimination against employees, it does not reach discrimination by one

employer against another. As the court below stated, "* * * the Act stands aside in respect of such action, forbidding discrimination only against employees" (Pet. ix-x). Whatever prejudice the employees of petitioner may suffer stems not from any discrimination against them but rather from the action directed towards their employer. This is not the kind of prejudice which the Act seeks to remedy. For relief, petitioner must look to Congress and not to the Board or the courts.[2]

Moreover, as petitioner acknowledges (Pet. 15), the instant case is one of first impression in the history of the Act. This factor suggests that its importance in the administration of the statute at the present time is at best speculative. And, of course, there is as yet no conflict among the circuits which calls for resolution by this Court.

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[2] There is no inconsistency between the ruling of the court below in this respect and its further ruling that AGC and Local 3 did violate the Act when they forced the suspension and removal of petitioner's employees from the Travis project (*supra*, pp. 2-3). The distinction lies in the fact, as the court below noted (Pet. App. A, vi, ix), that in the one case the pressure exerted by AGC and Local 3 was directed against the employees and resulted in their suspension, while in the other case the action was directed to and against the employer, and any prejudice to the employees was incidental.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1959.

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